

**Letter of Findings: 09-0023**  
**Sales and Use Tax**  
**For the Years 2005, 2006, and 2007**

**NOTICE:** Under IC § 4-22-7-7, this document is required to be published in the Indiana Register and is effective in its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of the document will provide the general public with information about the Department's official position concerning a specific issue.

**ISSUES**

**I. Sales and Use Tax – Imposition.**

**Authority:** IC § 6-2.5-2-1; IC § 6-8.1-5-1(c); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007).

Taxpayer protests the assessment of sales tax on several transactions of tangible personal property.

**II. Tax Administration – Penalty.**

**Authority:** IC § 6-8.1-10-2.1; [45 IAC 15-11-2](#).

Taxpayer protests the imposition of the ten percent negligence penalty.

**STATEMENT OF FACTS**

Taxpayer, an Indiana manufacturer, sells custom-designed doors. Pursuant to an audit, the Department of Revenue ("Department") assessed sales tax on transactions which Taxpayer did not collect and remit to the Department. Taxpayer protested the Department's assessment. This Letter of Findings is based upon the information in the file. Additional facts will be provided as necessary.

**I. Sales and Use Tax – Imposition.**

**DISCUSSION**

The Department's audit assessed sales tax on several of Taxpayer's transactions because Taxpayer's sales invoices indicated that it did not collect sales tax when the transactions took place. Taxpayer only protested the Department's assessment concerning two invoices. Taxpayer argued that the Department mistakenly included two invoices, which showed that Taxpayer had collected the sales tax on the merchandise sold, resulting in an over-assessment of tax.

All tax assessments are prima facie evidence that the Department's claim for the unpaid tax is valid; the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

IC § 6-2.5-2-1 provides:

- (a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.
- (b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state.

Pursuant to the audit, both Taxpayer and the Department agreed to utilize a sampling method to calculate sales tax for 2005, 2006, and 2007. From Taxpayer's 2005, 2006, and 2007 sales invoices, the Department thus selected sales invoices for three months each year. In this case, the invoices were February, March, and April of 2005, June, July, and August of 2006, and October, November, and December of 2007. The Department's audit then examined the invoices to ensure that sales tax on the transactions was properly collected and remitted. However, the Department's audit discovered that Taxpayer did not collect and remit sales tax on some of the transactions. The Department's audit thus listed those invoices and the amounts. After that, the Department's audit totaled the amount and then calculated sales tax due accordingly.

Taxpayer claimed that, after the audit, it had found two invoices, which showed the sales tax was collected, but were mistakenly included in the Department's audit. Taxpayer has provided sufficient documentation showing that Taxpayer had collected and remitted sales tax on the two invoices. Thus, the Department will recalculate the assessment in a supplemental audit.

**FINDING**

Taxpayer's protest on the assessment of sales tax is sustained.

**II. Tax Administration – Penalty.**

**DISCUSSION**

Taxpayer also protests the imposition of the negligence penalty.

Pursuant to IC § 6-8.1-10-2.1, the Department may assess a ten (10) percent negligence penalty if the taxpayer:

- (1) fails to file a tax return;
- (2) fails to pay the full amount of tax shown on the tax return;
- (3) fails to remit in a timely manner the tax held in trust for Indiana (e.g., a sales tax); or
- (4) fails to pay a tax deficiency determined by the Department to be owed by a taxpayer.

[45 IAC 15-11-2](#)(b) further states:

"Negligence" on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

The Department may waive a negligence penalty as provided in [45 IAC 15-11-2](#)(c), in part, as follows:

The department shall waive the negligence penalty imposed under [IC 6-8.1-10-1](#) if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section. Factors which may be considered in determining reasonable cause include, but are not limited to:

- (1) the nature of the tax involved;
- (2) judicial precedents set by Indiana courts;
- (3) judicial precedents established in jurisdictions outside Indiana;
- (4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc.;
- (5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.

Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

As a retail merchant, Taxpayer is an agent for the State of Indiana. Taxpayer should have collected and timely remitted the sales tax which it held in trust. Taxpayer did not provide any documentation establishing that its failure to timely remit tax held in trust was due to reasonable cause and not due to negligence.

#### **FINDING**

Taxpayer's protest on the imposition of negligence penalty is respectfully denied.

#### **SUMMARY**

For the reasons discussed above, Taxpayer is sustained regarding the Department's assessment of the two invoices. The Department will recalculate the assessment in a supplemental audit. However, Taxpayer's protest on negligence penalty is respectfully denied.

*Posted: 07/29/2009 by Legislative Services Agency*

An [html](#) version of this document.